



3510-17

DEPARTMENT OF COMMERCE

[Docket Number: 120530127-2127-02]

Tribal Consultation and Coordination Policy for the U.S. Department of Commerce

AGENCY: Department of Commerce

ACTION: Notice of Final Policy Statement

SUMMARY: In compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (November 6, 2000), the Department of Commerce (Department) adopts the following Tribal Consultation and Coordination policy statement. This policy establishes the manner in which the Department works with federally-recognized Indian tribes when developing Department policies that have tribal implications. The policy reaffirms the unique government-to-government relationship that exists between Indian tribes and the Department. The Department continues its commitment to support tribes in the development of strong and stable economies able to participate in today’s national and global marketplace. The notice also summarizes comments received on the draft Tribal Consultation and Coordination policy statement published in the Federal Register on July 3, 2012 (77 FR 39464) and the Department’s response to these comments.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or an electronic copy of the final policy should be directed to Dee Alexander, Senior Advisor on Native American Affairs, Office of Legislative and Intergovernmental Affairs, U.S. Department of Commerce Room 5422, 1401 Constitution Ave., NW, Washington, DC 20233, telephone (202) 482-0789.

SUPPLEMENTARY INFORMATION:

Background:

E.O. 13175, “requires Federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.”

On November 5, 2009, President Barack Obama reaffirmed the government-to-government relationship between the Federal Government and Indian tribal governments in a White House memorandum. Among other things, this memorandum acknowledges that Indian tribes exercise inherent sovereign powers over their members and territory. The memorandum also acknowledges that the United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

This final policy statement is intended only for internal management purposes and does not create any right, benefit, or responsibility enforceable against the United States, its agencies, entities, or instrumentalities, its officers or employees, or any other person. The Department believes this policy responds to President Obama's memorandum and builds upon and expands the principles expressed in the Department's previous policy, "American Indian and Alaska Native Policy of the Department of Commerce," promulgated on March 30, 1995. The Policy incorporates the requirements of E.O. No. 13175, and the Office of Management and Budget Memorandum, "Guidance for Implementing E.O. 13175, 'Consultation and Coordination with Indian Tribal Governments.'"

Summary of Comments received in Response to the draft Consultation and Coordination Policy:

On July 3, 2012, the Department published a notice and request for comments on a draft "Consultation and Coordination Policy for the U.S. Department of Commerce" policy statement in the Federal Register (77 FR 39464). The Department received letters from 15 different entities, with approximately 48 unique comments in response to the draft policy statement. A summary of comments received and the Department's responses to these comments are presented below. The Department also received seven comments and recommendations not specific to the policy principles. The notice also includes comments and the Department's responses to those comments received from two national webinars held on September 12, 2012 and September 19, 2012.

General comments and recommendations

Comment 1: The broad statement in the background section of the July 3 notice, that the policy "may not apply to a particular situation based upon the circumstances," should be replaced with a narrow description of the situations to which the policy would apply.

Response: Because the statement was included in the general background information in the *Federal Register* notice, it is not a part of the Department's policy request for comments. Therefore, no changes to the policy have been made in response to this comment.

Comment 2: Include in the final tribal consultation policy and supporting information a (1) description of efforts made to coordinate and consult with tribal officials on the draft policy; (2) complete summary of public comments, especially from tribal members; and (3) description of how the Department has addressed or incorporated comments into the final policy.

Response: The Department included the requested information in this notice.

Comment 3: The comprehensive Consultation and Coordination Policy should include overseeing consultation efforts between state, tribal and local entities and independent entities, such as the First Responder Network Authority (FirstNet).

Response: The Department will not implement this policy in such a manner as to conflict with statutory requirements. The Middle Class Tax Relief Act and Job Creation Act of 2012, which establishes FirstNet, describes a statutory method for consultation between FirstNet and State,

local, and tribal entities. The Department, in coordination with FirstNet, will determine the policy's applicability to other similar authorities as necessary.

Comment 4: Clarify the Department's role in coordinating with other federal agencies, and increase interagency coordination and collaboration to increase government efficiency and accountability.

Response: The Department will determine the scope and timing of any required interagency coordination as circumstances indicate.

Comment 5: Amend the policy to apply to Fishery Management Councils.

Response: Council meetings are a critical part of the fishery management planning process and are the first and earliest point of development for fishery management policy. It is most beneficial to Tribes, Councils and National Oceanic and Atmospheric Administration (NOAA) if there is early and active participation by Indian Tribes and Alaska Natives in these fora. NOAA strongly encourages Councils to discuss and work with Tribes to address their concerns while developing fishery conservation and management measures under the Magnuson Stevens Act, (MSA) 16 U.S.C. 1800 et seq. Thus, while it is NOAA's – and not the Councils' – responsibility to consult with federally recognized tribes under E.O. 13175, the Councils' current and future early engagement will facilitate and enhance tribal input into NOAA's rulemaking processes.

Comment 6: The policy should clarify that the Department's agency research activities are subject to the policy.

Response: Research activities conducted by a Department's bureau or agency are subject to this Policy and E.O. 13175 whenever such activities involve actions or policies that have tribal implications. The Department complies with existing statutory and regulatory consultation obligations.

Comment 7: How will the new policy affect the status of existing co-management agreements with the National Marine Fisheries Service (NMFS)?

Response: The new policy has no effect on co-management agreements established under section 119 of the Marine Mammal Protection Act. NMFS will continue to work with Alaska Native organizations under co-management agreements. Such co-management does not constitute, nor is it a substitute for, government-to-government consultation as required by E.O. 13175.

Comments to Section 1: Introduction

Comment 8: Add more language to the Introduction Section of the policy statement that reflects tribal sovereignty and tribes' rights to self-determination and self-government.

Response: The Department adopts the recommendation and has added the sentence to Section 1.01 stating, "The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination."

Comment 9: Include the term "on a pre-decisional basis" in Section 1.01. The term will ensure that the consultation occurs before a policy is changed.

Response: The Department does not adopt this recommendation. The term "pre-decisional" is a

term of art, and is not appropriate for this policy. The Department adheres to Section 3 of E.O. 13175, which includes the timing of consultation with the Department or its operating units, as stated in Section 7.02 of this policy.

Comment 10: Reference Executive Orders and Secretarial Orders in the Introduction Section of the policy.

Response: The Department refers to E.O. 13175 in Section 1.04 of this final policy. This policy does not refer to Secretarial Orders because the Department has joint Secretarial Orders with the Department of the Interior to implement provisions of the Endangered Species Act which only applies to specific Department components. It is not appropriate to include existing Secretarial Orders as part of this policy.

Comment 11: Include the relevant “regulations, statutes, Presidential memoranda, and Executive Orders” in the Introduction section of the policy statement.

Response: The Department adopts this comment and has added the following sentence to the end of Section 1.04: *“This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.”*

Comment 12: Substitute the word “input” in the first sentence of Section 1.04 with “participation.”

Response: The Department does not adopt the recommendation. The term “input” is consistent with Section 5(a) of E.O. 13175.

Comment 13: Include a new sub-section in the Introduction Section of the policy with the following wording; “The Department recognizes and respects the diversity of Indian tribes and understands that they are culturally, traditionally, and administratively different. This diversity makes it impossible for any federal agency to make the sole decision regarding whether or in what manner it is appropriate to consult with tribes. The only entities that know enough about individual tribes to make that determination are the tribes themselves. Therefore, consultation can be initiated by either the Tribes or the Department.”

Response: Section 7.01 of this policy provides for consultation initiated by either a Tribe or the Department.

Comments to Section 2: Background

Comment 14: The policy should clarify whether it replaces the 1995 policy. If it does not, then include the 10 enumerated principles and expand the principles in the new policy.

Response: To be clear, this new policy replaces the 1995 policy and builds and expands upon the principles in the 1995 policy, and it incorporates the requirements of E.O. 13175 and Presidential Memorandum, “Tribal Consultation,” 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009). The Department also references the *1995 American Indian and Alaska Native Policy of the Department of Commerce* in Section 2.01 of this policy.

Comment 15: Include E.O. 13175’s policymaking criteria with explanation of how DOC will apply them when “formulating and implementing policies that have tribal implications.”

Response: This recommendation is addressed in Section 2.01 of the policy, which incorporates E.O. 13175, Presidential Memorandum, “Tribal Consultation,” and the Office of Management and Budget’s implementing guidance of July 30, 2010.

Comment 16: Provide additional guidance on the Department’s process for determining whether policies have tribal implications, including examples of past Department actions that were subject to consultations. Provide detailed guidance on how the Department will conduct consultations and prepare tribal impact statements for regulations with tribal impacts that impose costs, are not required by legislation, and preempt tribal law.

Response: The Department does not adopt this recommendation. This policy is intended to provide high-level guidance to operating units to implement depending on their circumstances and governing legal authorities. The policy also provides the Department with the necessary flexibility to ensure its consultations are as effective as possible.

Comments to Section 3: Authority

The Department received no comments to Section 3.

Comments to Section 4: Definitions

Comment 17: Amend the definition 4.01, “Consultation” to include an accountable process, which enables Tribal officials to participate in Federal decision-making before an agency takes an action, or commits to a decision to consider an action or policy with Tribal implications. Note that consultation is not a single act of communication, but consists of multiple steps which culminate in an outcome that reflects the views, needs and objectives of both Federal and Tribal participants.

Response: The Department does not adopt the recommendation. The definition in this final policy is consistent with E.O. 13175. Section 7 of this policy also addresses the elements of consultation including means of communication, exchange of information, and notice.

Comment 18: Amend the definition of “Consultation” to incorporate the following key principles: Consultation is a process which enables the tribes to participate in federal decision making before an agency takes an action, or commits to a decision to consider an action or policy with tribal implications. Consultation is not a single act of communication but rather a process involving multiple steps which culminate in an outcome that reflects the views, needs and objectives of both federal and tribal participants. Consultation may be initiated by tribal governments to discuss and exchange information on a government-to-government basis. Consultation can be formal with established time lines and required publications, or less formal through means such as teleconferencing. Consultation is triggered when the Department considers “Policies that have tribal implications,” as that term is defined in E.O. 13175, or when the Department considers proposals for regulations, rulemaking, legislation, guidance, policy formulation or actions that may have a substantial direct effect on one or more tribes, on the relationship between tribes and the federal government, or on the distribution of power and responsibilities between the tribes and federal government.

Response: The Department does not adopt the recommendation. The final policy’s definition is

consistent with E.O. 13175; moreover, Section 7 of this policy addresses the elements of consultation including means of communication, exchange of information, and notice.

Comment 19: Add to the definition of “consultation” the term “actions” in addition to “policies.”

Response: The Department does not adopt the recommendation. The term “policies that have tribal implications” is the term for actions requiring the procedures described in the E.O. 13175 and therefore, this Department policy implements E.O. 13175.

Comment 20: The policy should include Alaska Native Corporation in the definition of “Indian Tribe,” or adopt a parallel formal consultation policy for Alaska Native Corporations, per the Congressional direction to Federal Agencies in the Consolidated Appropriations Act of 2004, Pub. L. 108-199, Div. H, Section 161, which is codified as a note to 25 U.S.C. § 450.

Response: The Department has added the following definition for Alaska Native Corporations and will include ANCs in the policy consistent with 25 U.S.C. § 450 note on “Consultation with Alaska Native Corporations: 07. *“Alaska Native Corporation,” pursuant to 43 U.S.C. §§ 1602 et seq., any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.*

The Department also added a new Section 8. “Consultation with Alaska Native Corporations,” to the Policy, which reads as follows:

01. In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under E.O. 13175 (Public Law 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267).

02. The Department interprets the term “Alaska Native Corporations” in this requirement to mean “Native Corporations” as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a federally recognized tribe in Alaska.

03. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:

a. Consultations with Alaska Native Corporations will occur on a “government-to-corporation”

basis, rather than “government-to-government” basis to reflect the distinction between sovereign governments and corporate entities.

b. Government-to-corporation consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Comment 21: Clarify whether the policy applies to the Office of the Secretary as well as to its operating units, and identify the organizations to which the policy does not apply. Also, require the implementation of procedures at each bureau and agency level to allow the bureaus/agencies to determine when a policy has tribal implications, and allow the Tribes to consult on the various agency-level policies.

Response: The Department does not adopt the recommendation. This policy is intended to provide high-level guidance to the Department’s bureaus to allow them to implement the policy depending on their circumstances and governing legal authorities. Section 6 of the policy allows, but does not require, the development of operating level, bureau and agency, procedures. The policy applies to the Office of the Secretary, as implemented by the Tribal Consultation Official, see Section 5.01.

Comment 22: On definition 4.04, “policies that have tribal implications”:

a. Tribal consultation officials should interpret the term “policies that have tribal implications” broadly so that the term applies to more than just regulations and legislative action. The policy should clarify that the phrase in section 7.02.a “other policy statements and actions” is intended to apply broadly to include all written statements of policy or actions that have the potential to affect tribal rights and interests.

b. Tribal consultations should also be triggered by any Department action that affects American Indian, Alaska Native and Native American tribes, not just formal Department policies.

c. Include language about the timing of consultation. Amend the policy to include the following or similar language from the 1995 policy: “work with tribal governments prior to implementing any action.”

Response: The subject phrase is a term defined in E.O. 13175 and applies to “actions” as well as policies and regulations.

Comment 23: Amend definition 4.05 “Tribal Officials,” to read as follows: “‘Tribal officials’ means an elected or duly appointed Tribal leader or official delegate, designated in writing by a Tribe, or a duly authorized representative of an authorized intertribal organization.” Also, include official delegates who are designated as such by their tribes to ensure that individuals who have been authorized to consult on behalf of their tribe will be accorded the same status as elected or duly appointed officials.

Response: The Department used the definition from E.O. 13175 for “Tribal officials,” which includes “duly appointed officials,” meaning that a delegated representative of a tribal government will be recognized as an appropriate “tribal official.”

Comments to Section 5: Roles and Responsibilities

Comment 24: The tribal consultation official should develop protocols, SOPs and, as appropriate, a Memorandum of Understanding (MOU) for formal and informal consultations. These documents would establish the means for providing and exchanging information between the Department and tribal governments.

Response: The Department does not adopt this recommendation. This policy is intended to provide high-level guidance to the Department's bureaus and agencies to allow them to implement the policy depending on their circumstances and governing legal authorities. The Department intends that operating units address such procedures in their handbooks or other guidance as appropriate.

Comment 25: The Department should encourage each of its bureaus and agencies to allocate funding toward Tribal consultation activities, including consultation itself, staff training, and other associated activities.

Response: The Department does not adopt the recommendation. The Department will encourage the operating units to work within existing resources to comply with E.O. 13175.

Comment 26: Tribal officials situated at headquarters are poorly positioned to implement the meaningful and timely consultation process anticipated by E.O. 13175. National consultation officials have little experience on the regional issues and insufficient time to focus on the issues to effectively monitor and coordinate. A regional consultation official would have more regular contact with the tribes and would be able to screen issues and provide advance notice of impending issues. Therefore, change Section 5.02.b to require the designation of consultation coordinators at the regional level, particularly within operating units such as NOAA. Also, give the tribes significant input into the selection process for the designated national and regional consultation officials.

Response: The Department does not adopt the recommendation. Section 5.02.b of this policy allows operating units to delegate authority.

Comment 27: The Department's tribal consultation official or designee should certify to the Office of Management and Budget (OMB) that draft final regulations or proposed regulations with tribal implications comply with EO 13175. A tribal consultation summary report is part of the required annual update to OMB that each agency must provide.

Response: The Department added a paragraph under Section 5.01; the new paragraph reads: *d. The Tribal Consultation Official has the responsibility for submitting an annual report to OMB pursuant section 7(a) of E.O. 13175.*

Comment 28: Make it clear how, and when, each operating unit designates officials to consult with the tribes. Explain how tribes can open lines of communication with the designated officials.

Response: Pursuant to Section 5.02.a of the policy, each operating unit is responsible for designating an official at the operating unit level and for the timing of that designation.

Comment 29: Clarify the term “periodic dialogue” in Section 5.01.c, or replace that phrase with the term “meaningful dialogue” or “biannually” to give more guidance on what the term means in the context of the policy.

Response: The Department does not adopt the recommendation. The phrase “periodic dialogue” is intended to allow flexibility in the regular review of this policy’s implementation.

Comment 30: Section 5.02.a. of the Policy states that the head of each operating unit within the Department will designate an official to ensure compliance with the Policy. As written, there is no timeframe for this designation in the policy. Institute a timeframe for this process.

Additionally, some units already have an experienced designated official, while other units’ designated officials may have little to no experience in tribal consultation. Increase interdepartmental cooperation, in addition to providing a timeline for designating the officials, to provide certainty and continuity for Tribes as they navigate the new policy and interact with federal officials across the Department.

Response: The Department does not adopt the recommendation. The Department determined that these responsibilities are best addressed at the operating unit level to allow each operating unit to assess its needs to support interactions and relationships with tribes.

Comment 31: Add the following responsibilities to the tribal consultation official or designated officials in the operating units Section: Responding to inquiries from tribes about a specific consultation – past, ongoing, or proposed; responding to inquiries about the consultation process in general; receiving requests from tribes seeking to initiate consultation; coordinating to identify and screen for potential consultation issues; preserving and maintaining complete consultation records; assisting tribal governments seeking to access consultation records; and receiving post-consultation complaints, objections, and alleged inconsistencies.

Response: The Department does not adopt the recommendation. This policy is intended to provide high-level guidance to the Department’s bureaus and agencies to allow them to implement the policy depending on their circumstances and governing legal authorities. The Department intends that operating units address this matter in their handbooks or other guidance as appropriate.

Comment 32: Establish tribal liaison positions to implement the consultation policy, and to encourage agencies to allocate funding for tribal consultations.

Response: The Department does not adopt the recommendation, and encourages operating units to work with existing resources and staff to comply with E.O. 13175.

Comments to Section 6: Training and Guidance

Comment 33: The focus of the consultation in most cases should be at the local level; however, it is critical that bureau or agency officials at the headquarters level with no background in tribal relations be properly trained in the consultation process.

Response: This policy provides for training in Section 6.01.

Comment 34: Section 6.02 provides that “each operating unit may develop and issue tribal consultation guidance.” Agencies should be required to develop Tribal consultation guidance.

This guidance should be developed under supervision of the Tribal Consultation Official to ensure that its content is uniform across the Department's operating units.

Response: The Department addresses this recommendation in Section 6.02 of the Policy which permits operating units to develop tribal consultation guidance provided that the guidance is consistent with DAO 218-8 and is reviewed by the Tribal Consultation Official.

Comments to Section 7: Consultation

Comment 35: The term "reasonable effort" in Section 7 is unclear. Clarify that the Department will confirm receipt of a tribal request for consultation within 30 days, or even 45 days. Tribes believe that there are few circumstances where the Department would not be able to accommodate a request, and urge the Department to conduct face-to-face consultations with tribes.

Response: The Department does not adopt the recommendations. Operating units may have specific time constraints imposed by statute or circumstances, and this policy is intended to provide them with the flexibility to accommodate those constraints.

Comment 36: It is important for the consultation process to retain the requirement that it is a government-to-government interaction. The consultation process must also involve elected tribal officials unless otherwise approved by the tribe.

Response: This comment is addressed in the policy definition of "Tribal officials," adopted from Section 1(d) of E.O. 13175.

Comment 37: The Department should include in the policy further guidance indicating standards for determining which forms of consultation are appropriate in various circumstances, and allow the tribes to consult on these standards.

Response: The Department does not adopt the recommendation. This policy is intended to provide high-level guidance to allow operating units to implement the policy depending on their circumstances and governing legal authorities. The Department intends that operating units address details of their respective consultation process in their handbooks or other guidance as appropriate.

Comment 38: Coordination with the tribes should not be limited to formal consultation, and a variety of consultation types should be further defined in sub-section 01. Consultation types could include informal discussions with tribal leaders, meetings with individual tribes, listening sessions, and formal consultations. Add as the last section to sub-section 01: "Ultimately the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials."

Response: The Department adopts this recommendation and has added the following language to the end of Section 7.01: *Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.*

Comment 39: Develop a tribal liaison position for the Alaska region. Tribal liaisons should be trained in how to conduct tribal consultations to help facilitate tribal-agency relationships.

Response: The Department does not adopt the recommendation to develop a tribal liaison position for the Alaska region. This comment has been forwarded to NOAA for its consideration.

Comment 40: The phrase “reasonable effort” in Section 7.02.b. is unclear, and should either be removed and replaced with language clarifying the specific time frame that the Department considers reasonable.

Response: The Department does not adopt the recommendation to remove the term “reasonable effort” because consultations are intended to reflect a relationship between the operating unit and the tribe, taking into account the resources and mission of the operating unit. Some operating units have specific time constraints imposed by statute or other circumstances, and this policy is intended to provide those units with sufficient flexibility to accommodate those parameters.

Comment 41: Add to end of last sentence in Section 7.02.b. the following language: “prior to substantive decision points and/or final action” and include that “the timing of consultation is to allow for the substantive consideration of tribal input and concerns before finalizing a decision on federal policies, regulations, or legislation.”

Response: The Department adopts the recommendation in part and has added the following language to the end of subsection b.: *Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation prior to substantive decision or final action.*

Comment 42: Section 7.02.c. should include a statement that the Department will clearly notify tribes of events such as meetings that it considers to be consultations, and that the Department will do so within 45 or 90 days prior to the consultation. The Department should seek tribal participation in its deliberative process about the necessity of a proposed action.

Response: The Department will advise its operating units to provide 45 days advanced notice of any invitation to conduct a consultation, or to provide notice at the earliest time practicable. Such notices will include any relevant materials to facilitate discussion. This response does not supersede any existing legal authorities or responsibilities of the operating units.

Comment 43: Communication to and from rural Alaska can be difficult, and the Department should follow up on correspondence to Tribes and Tribal entities.

Response: The final policy addresses follow-up notices to tribal officials in Section 7.02.

Comment 44: The phrase “when practical” in Sections 7.01, 7.02.b and 7.02.d is unclear, and the Department should amend the section to clarify that the Department will provide tribes with a specific amount of time to prepare for consultations and submit views, and will be flexible about the time allowed.

Response: The Department agrees with the recommendation to provide Tribes adequate time to prepare for consultation as well as relevant materials to facilitate and submit their views, and will advise its operating units to develop consultation materials, as appropriate. In addition, the Department has added the following language to Section 7.01 *Consultation/Consultation*

Process: “The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.”

Comment 45: For Section 7.e., when a consultation occurs between the Department or its operating units and Tribal officials, the Department or operating unit should provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. Tribes should be able to agree to the accuracy of the summaries of the tribes’ position in the consultation. The follow-up communications should be transmitted within 30 days of the consultation. They should also specifically indicate whether the Department accepts the tribes’ position, or include an explanation of the Department’s position. The Tribal Consultation Official or head of each operating unit conducting a consultation should also maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules. Additionally, the policy should acknowledge that Tribes are more familiar with their local environment and, thus, the policy should clarify that the Tribes possess unique knowledge. The policy should also allow the Tribes to initiate consultations whenever there is a potential for their rights and interests to be affected. The consultation process should also be timely and initiated early in the decision making process to allow the tribe to have access to information about the proposed regulation or policy. Regular communication between the Department and a Tribe is an essential precursor to the consultation process; consultation should be as a matter of course and not just when “practical.” The policy should also distinguish between regular communications, calls, site visits, and participation in events and informal meetings, which are not intended to serve as the formal negotiation component of the government-to-government consultation process.

Response: The Department does not adopt the recommendation for a specified timeframe to submit a written summary of the consultation. Section 7.2.e. of the policy states that “the Department or operating unit will provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation.” The Department expects operating units to address written consultation summaries in their handbooks or other guidance, as appropriate. Written summaries are not intended to be used to document regular communications and interactions between Department employees and Tribes; rather, these written communications are part of the consultation process.

Comment 46: A written summary of consultation should include the Tribe’s responses and should become part of the official record on consultation activities maintained by the operating unit and the Department, and should form the basis for a tribal impact summary.

Response: E.O. 13175 requires a tribal summary impact statement when an agency (1) promulgates regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and are not required by statute, or (2) promulgates regulations that have tribal implications and that preempt tribal law.

The Department intends consultation reporting to be a separate component of all consultations, regardless of whether they involve regulations. In response to this comment, the Department has added the following language as a new subparagraph to 5.02.c. *The head of each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulation that has tribal implications and that preempts tribal law.*

Comment 47: The Department should distribute a follow-up report detailing immediate and long-term actions to be taken after consultations, and should add language in Section 7.02.e. to the effect that documentation includes any proposal for Departmental follow-up actions.

Response: The Department does not adopt the recommendation. Sec. 7.02.e. sufficiently addresses this request by requiring the Department or operating unit to provide tribal officials with “a formal written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during the consultation.”

Changes to the Proposed Policy

The policy statement adopted in this Notice differs from the proposed policy statement as follows:

- (a) Proposed policy Section No. 1, “Introduction,” subparagraphs 01. and 04. were modified in response to comments.
- (b) Proposed policy Section No. 2, “Background,” subparagraph 01. was modified to include wording on consultation with Alaska Native Corporations in compliance with existing law.
- (c) Proposed policy Section No. 4, “Definitions,” subparagraph 03. was modified to expressly state that the definition of operating units includes all bureaus and agencies in response to comments.
- (d) Proposed policy Section No. 4, “Definitions,” was modified to include a definition for “Alaska Native Corporation” in response to comments
- (e) Proposed policy Section No 5, “Roles and Responsibilities for Consultation,” subsection 01. was modified to include additional reporting language in response to comments.
- (f) Proposed policy Section No. 5, “Roles and Responsibilities for Consultation,” subsection 02. was modified in response to comments to include additional responsibilities language for the heads of operating units.
- (g) Proposed policy Consultation Process Section No. 7, “Consultation Process,” subparagraph 01. was modified and includes additional language relating to the purpose of consultation.

(h) Proposed policy Consultation Process Section No. 7, “Consultation Process,” subparagraph 02 was modified in response to comments received to include additional language relating to responses to requests for tribal consultations.

(i) Proposed policy Section No. 8, “Implementation,” was renumbered to Section No. 9.

(j) A new Section No. 8, “Consultation with Alaska Native Corporations,” was added to address the consultation with Alaska Native Corporations.

The final Consultation and Coordination Policy of the U.S. Department of Commerce now reads as follows:

Tribal Consultation and Coordination Policy of the U.S. Department of Commerce

Section 1. Introduction

01. This “Tribal Consultation and Coordination Policy of the U.S. Department of Commerce” (“Tribal Consultation Policy” or “Policy”) establishes the manner in which the Department of Commerce (“Department”) works with Indian tribes on a government-to-government basis to build a durable relationship and address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights, as well as support tribes in developing strong and stable economies able to participate in the national and global marketplace. The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination.

02. The Department recognizes the Federal Government’s unique legal relationship, as established in the Constitution, statutes, treaties and federal court decisions, between Tribal governments and the Federal Government.

03. The Department and operating units will seek and promote cooperation within the Department and with other agencies that have related responsibilities. The Department’s mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The Department and operating units will promote intradepartmental and interagency coordination and cooperation to assist Tribal governments in resolving issues requiring mutual effort.

04. Executive Order (E.O.) No. 13175, “Consultation and Coordination with Indian Tribal Governments,” requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. This Policy provides uniform standards and methodology outlining consultation procedures for all Department personnel working with Tribal governments regarding policies that have tribal implications. This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.

Section 2. Background

01. This Policy builds upon and expands the principles expressed in the “American Indian and Alaska Native Policy of the Department of Commerce,” promulgated by the Department on

March 30, 1995. The Tribal Consultation Policy incorporates the requirements of E.O. No. 13175; Presidential Memorandum, “Tribal Consultation,” 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009); the Office of Management and Budget Memorandum, “Guidance for Implementing E.O. 13175, ‘Consultation and Coordination with Indian tribal Governments;’” and the Consolidated Appropriations Act, 2004, Pub. L. 108-199, Div. H § 161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, Pub. L. 108-447, Div. H., Title V § 518, 118 Stat. 2809, 3267, relating to consultation with Alaska Native Corporations.

02. This Policy is for internal management only and shall not be construed to grant or vest any right to any party not otherwise granted or vested by existing law or regulations.

Section 3. Authority

01. This Tribal Consultation Policy is issued pursuant to the authority of 5 U.S.C. § 301 and Department Administrative Order (DAO) 218-8, “Consultation and Coordination with Indian Tribal Governments.” This Policy shall have the same force and effect as a DAO. Amendments (substantive changes) or revisions (corrections or updates) to this Policy may be developed and issued by the Department of Commerce Tribal Consultation Official or the Secretary’s designee in consultation with Tribal governments.

Section 4. Definitions

01. “Consultation,” as defined in Section 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.

02. “Indian tribe (or Tribe),” as defined in Section 1(b) of E.O. No. 13175, means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a.

03. “Operating units,” as defined in Section 3.c.1 of Department Organization Order 1-1, are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) of the Department. The operating units are the components of the Department through which most of its substantive functions are carried out. “Operating units” includes all Department bureaus and agencies.

04. “Policies that have tribal implications,” as defined in Section 1(a) of E.O. No. 13175, refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

05. “Tribal Consultation Official,” as defined in Section 5(a) of E.O. No. 13175, means the designee of the Secretary with principal responsibility for the implementation of this Policy.

06. “Tribal officials,” as defined in Section 1(d) of E.O. No. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

07. “Alaska Native Corporation,” pursuant to 43 U.S.C. §§ 1602 *et seq.*, any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

Section 5. Roles and Responsibilities for Consultations

01. Department of Commerce Tribal Consultation Official

a. The Tribal Consultation Official is an individual in the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary who is duly appointed to act as a liaison between the Secretary of Commerce and Tribal officials. The Tribal Consultation Official may delegate authority, as necessary, to the head of each operating unit. The Tribal Consultation Official has primary responsibility for ensuring compliance with DAO 218-8, this Policy, and E.O. No. 13175, and is responsible for tribal consultations and coordination for the Office of the Secretary programs.

b. The Tribal Consultation Official has responsibility for coordinating the implementation of this Policy and DAO 218-8 within the Department and all operating units.

c. The Tribal Consultation Official will engage tribal officials in periodic dialogue to discuss the Department’s implementation of this Policy. The dialogue will provide an opportunity for tribal officials to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

d. The Tribal Consultation Official is responsible for submitting an annual report to OMB pursuant section 7(a) of E.O. No. 13175.

02. Head of operating unit Responsibilities

a. The head of each operating unit will designate an official in the headquarters office who has primary responsibility for ensuring compliance with this Policy within the operating unit. Each operating unit’s designated official will work with the Department Tribal Consultation Official to ensure coordination of tribal consultations, as necessary. The designated official is responsible for the development, maintenance and internal distribution of any guidance produced by the operating unit in compliance with the requirements of this Policy.

b. The head of each operating unit or the designated official may delegate authority to appropriate individuals within the operating unit.

c. The head of each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulations that have tribal implications and that preempt tribal law.

Section 6. Training and Guidance

01. The Tribal Consultation Official and the head of each operating unit will ensure that personnel assisting with tribal consultations have appropriate training.
02. Each operating unit may develop and issue tribal consultation guidance to assist staff in preparing, reviewing and managing the consultation process within their respective operating units, so long as:
 - a. The guidance is consistent with DAO 218-8, and
 - b. The Department's Tribal Consultation Official reviews the guidance.

Section 7. Consultation

01. The Consultation Process. Consultation may take a variety of forms. Implementing this Policy may require a range of formal and informal planning activities. The Department and operating units' consultation processes may include one or more of the following: meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events. The Tribal Consultation Official or the head of each operating unit, as applicable, will make a reasonable effort to accommodate a tribal request for consultation. Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.
02. Elements of the Consultation Process.
 - a. Ongoing communication shall be a regular part of the government-to-government relationship with tribal governments. The Department and operating units will engage in meaningful dialogue with Tribes regarding all policies that have tribal implications.
 - b. Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation.
 - c. Notification. The Department and operating units will notify Tribes of policies that have tribal implications. Follow-up may be necessary to ensure the appropriate tribal official has received the consultation notification and accompanying documents. These notifications do not replace or supersede any notifications that are required by statute or E.O. regarding tribal consultations.
 - d. Consultation Planning. The Department or operating units will coordinate with tribal officials to plan logistical considerations for the consultation. The Department or operating units will, when practical, allow Tribes a reasonable amount of time to prepare for consultation and submit their views on policies that have tribal implications. The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.
 - e. Written Communication and Record-Keeping. When a consultation occurs between the Department or its operating units and Tribal officials, the Department or operating unit will

provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. The Tribal Consultation Official or head of each operating unit conducting a consultation will maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules.

Section 8. Consultation with Alaska Native Corporations

01. In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under E.O. 13175 (Public Law 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267).

02. The Department interprets the term “Alaska Native Corporations” in this requirement to mean “Native Corporations” as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a federally recognized tribe in Alaska.

03. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:

a. Consultations with Alaska Native Corporations will occur on a “government-to-corporation” basis, rather than “government-to-government” basis to reflect the distinction between sovereign governments and corporate entities.

b. Government-to-corporations consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Section 9. Implementation

01. The Tribal Consultation Official, located in OLIA within the Office of the Secretary, is responsible for ensuring implementation of this Policy. This responsibility may be delegated as appropriate. This Policy does not alter or affect any existing duty or authority of any individual operating unit.

02. This Policy is not intended to, and does not, grant, expand, create or diminish any legally

enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

03. This Policy is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. The Department and operating units have no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

04. This Policy shall be updated as necessary.

Section 10. Effective Date

01. This Policy is effective beginning with the date of this memorandum and will remain in effect until it is amended, superseded by a Departmental Administrative Order, or revoked.

Dated: May 21, 2013.

Rebecca M. Blank
Acting Secretary of Commerce

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